

Supreme Court, U.S.

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In The

Supreme Court of the United States

October Term 1978

—0—

79-36

No.

—0—

RICHARD ROBINSON,

Petitioner,

vs.

STATE OF NEBRASKA,

Respondent.

—0—

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

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**PETITION FOR A WRIT OF CERTIORARI TO THE
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—0—
The petitioner Richard Robinson respectfully prays
that a writ of certiorari issue to review the judgment and
opinion of the Supreme Court of Nebraska entered in this
proceeding on January 24, 1979.

—0—

OPINION BELOW

The opinion of the Supreme Court of Nebraska, as reported in the Northwestern Reporter at 274 N. W. 2d 553, and with citation to the same opinion in the Nebraska Reports at 202 Neb. 210, appears in the appendix hereto.

JURISDICTION

The judgment of the Supreme Court of Nebraska was entered on January 24, 1979. A timely motion for rehearing was denied on April 11, 1979, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U. S. C. No. 1257 (3).

QUESTIONS PRESENTED

1. Whether the offense of throwing away or abandoning a dead human body as defined by Section 28-1033, Neb. Rev. Stats. 1943, of which petitioner was convicted, is unconstitutionally vague and overbroad under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.
2. Whether petitioner's prosecution and conviction of throwing away or abandoning a dead human body following his acquittal of murdering the person whose body he was convicted of abandoning violates the Double Jeop-

ardy Clause of the Fifth Amendment to the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V, United States Constitution

...; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; ...

Amendment XIV, United States Constitution

...; nor shall any State deprive any person of ... liberty ... without due process of law; ...

STATEMENT OF THE CASE

Petitioner was charged with and convicted of having thrown away or abandoned a dead human body in a place other than a regular place for burial and without the issuance of a proper death certificate in Scottsbluff County, Nebraska on September 23, 1976 in violation of Section 28-1033, Neb. Rev. Stats., 1943.

Stipulated evidence at petitioner's bench trial reflected that on September 23, 1976, David Parker was shot with a shotgun at petitioner's residence near Torrington, Wyoming and died there a short time later. Out of fear of unfair treatment by the local Sheriff and in order to get the body away from his residence and "mind", petitioner and his wife loaded the body into the trunk of the deceased's

vehicle. Petitioner then drove the vehicle until it nearly ran out of fuel and left it in a ditch on the roadside. The vehicle's location was later determined to be in Nebraska, 1,059 feet east of the Wyoming-Nebraska state line.

On April 22, 1977 in Torrington, Wyoming petitioner was acquitted of the murder of David Parker. The present charge was filed on September 2, 1977.

In his present Nebraska prosecution, petitioner filed pre-trial motions raising the constitutional issues presented herein. These motions were denied, and he preserved the issues in his stipulation of evidence at his bench trial on April 3, 1978. Following his trial he was found guilty as charged of throwing away or abandoning a dead human body, and was sentenced to a term of two years imprisonment in the Nebraska Penal and Correctional Complex.

Petitioner appealed his conviction to the Nebraska Supreme Court, raising the same federal constitutional questions presented herein, and that court entered its judgment and opinion on January 24, 1979, resolving the constitutional issues against him and affirming his conviction and sentence.

REASONS FOR GRANTING THE WRIT

1. The decision below involves several substantial federal constitutional questions either decided in a way which conflicts with applicable decisions of this Court, or not heretofore determined by this Court.

A. Unconstitutional vagueness and overbreadth.

The elements of the constitutional void for vagueness doctrine arising out of the Due Process Clause as applied to non-First Amendment situations were recently summarized as follows in *Grayned v. City of Rockford*, 408 U. S. 104 (1972) :

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." 408 U. S. 104 at 108-109. See Note, "The Void-for-Vagueness Doctrine in the Supreme Court," 109 U. Pa. L. Rev. 67 (1960).

An enactment which is clear and precise may nevertheless be unconstitutionally overbroad if in its reach it prohibits constitutionally protected conduct. One has

standing to challenge a law as unconstitutionally vague or overbroad on its face without claiming that his own activities in dispute are constitutionally protected. *Id.* at 114, and *Coates v. City of Cincinnati*, 402 U. S. 611 at 616 (1971).

Several recent decisions of this Court illustrate application of the vagueness and overbreadth doctrines to invalidate challenged laws. In *Coates v. City of Cincinnati*, *supra*, the word "annoying" was found to be fatally vague in an ordinance rendering it a crime for "three or more persons to assemble . . . on any of the sidewalks . . . and there conduct themselves in a manner annoying to persons passing by . . .".

Papachristou v. City of Jacksonville, 405 U. S. 156 (1972) invalidated a lengthy vagrancy ordinance which made it criminal, *inter alia*, to be a "person wandering or strolling around from place to place without any lawful purpose or object" or a "person(s) neglecting all lawful business."

In *Smith v. Goguen*, 415 U. S. 566 (1974), this Court declared void for vagueness a Massachusetts flag misuse statute which imposed criminal penalties on anyone who "publicly . . . treats contemptuously the flag of the United States or Massachusetts." The Court concluded that the statute could not stand because of a lack of definition of the term "contemptuously."

Finally in *Colautti v. Franklin*, — U. S. —, 99 S. Ct. 675, 58 L. Ed. 2d 596 (1979), a section of the Pennsylvania Abortion Control Act imposing a standard of care on persons performing abortions where such persons determine that a fetus "is viable" or "may be viable" was declared

impermissibly vague with regard to both the viability determination requirement and the stated standard of care.

The challenged statute in the present case renders it "unlawful for any person or persons to throw away or abandon any dead human body, or any portion thereof, in any place other than a regular place for burial and under a proper death certificate issued" under specified other statutes. Sec. 28-1033, Neb. Rev. Stats. 1943. Petitioner submits that in the absence of more precise definitions much of the language of this statute is unconstitutionally vague in failing to provide fair warning of what is prohibited or to contain ascertainable standards to guide its enforcement. Even if construed as sufficiently clear and precise, the statute is unconstitutionally overbroad in punishing constitutionally protected conduct.

For example, a pregnant woman suffering a spontaneous abortion, or a physician inducing a constitutionally-protected abortion and disposing of the fetal tissue in the medically-customary manner without a death certificate or traditional burial could be prosecuted under a construction of the statutory language "dead body, or any portion thereof" to include the aborted fetal tissue. Furthermore, this statute would permit the punishment of persons participating in the disposition of dead bodies by cremation with scattering or inurnment of ashes, testamentary transfer for medical or scientific use of all or parts of one's body, or other presumably constitutionally-protected disposition "in any place other than a regular place for burial."

In its opinion below, the Nebraska Supreme Court conceded that "(a)lthough hypothetical factual situations

might be imagined where the application of the statute might raise constitutional issues, such imaginary situations do not help the defendant, nor make the statute unconstitutional." *State v. Robinson*, 202 Neb. 210 at 213, 274 N. W. 2d 553 at 555. This finding ignores the decisions of this Court, cited supra, granting standing to persons to challenge enactments as unconstitutionally vague and overbroad on their faces despite the inability of such persons to demonstrate that the challenged language was vague as applied to their actions or that their own conduct was constitutionally protected.

B. Double jeopardy.

The Double Jeopardy Clause of the Fifth Amendment has been found to create a sufficiently fundamental constitutional right to be incorporated into and applicable to the states through the Fourteenth Amendment. *Benton v. Maryland*, 395 U. S. 784 (1969).

The basic test which has been applied to determine if two offenses are sufficiently distinguishable to permit cumulative prosecutions or punishment under the Double Jeopardy Clause is whether each offense requires proof of a fact which the other does not. *Blockburger v. United States*, 284 U. S. 299 (1932). But *Blockburger* is not the only standard. Even where two offenses are sufficiently different to permit the imposition of consecutive sentences, successive prosecutions will be barred in some cases where the second prosecution requires the relitigation of factual issues already resolved by the first.

In Re Nielsen, 131 U. S. 176 (1889), held that a Mormon convicted of cohabiting with his two wives over a

two and one-half year period could not subsequently be prosecuted for adultery with one of them on the day after the end of the period of cohabitation. *Ashe v. Swenson*, 397 U. S. 436 (1970) decided that an acquittal of robbing one of several poker players collaterally estopped a later prosecution of the accused for robbing any of the other members of the poker game. Even though the two offenses charged in *Nielsen* and *Ashe* required "proof of a fact which the other (did) not" this Court held the separate charges to be the same for purposes of protecting the defendants from having to "run the gantlet" twice. *Ashe*, supra, at 446. See the discussion in *Brown v. Ohio*, 432 U. S. 161 (1977) at 166, fn. 6.

In *Brown v. Ohio*, supra, the Court held that a conviction of the lesser included offense of joyriding barred a later prosecution for auto theft arising out of the taking and use of the same vehicle, despite findings of the state courts that the two crimes were based on two independent acts committed at different times during a nine-day period. In a concurring opinion, Justices Brennan and Marshall re-asserted their position of long-standing that the Double Jeopardy Clause requires that "all charges growing out of conduct constituting a 'single criminal act, occurrence, episode, or transaction' must be tried in a single proceeding." 432 U. S. 161 at 170. See also a summary of other decisions in which this position had been asserted in their opinion dissenting from the denial of certiorari in *Thompson v. Oklahoma*, 429 U. S. 1053 (1977).

Harris v. Oklahoma, 433 U. S. 682 (1977) reversed on double jeopardy grounds a defendant's conviction of robbery with firearms following his earlier conviction of felony murder arising from the same incident.

Petitioner submits that while the *Blockburger* test was not violated by the dual prosecutions in this case, the basic rationale underlying the Double Jeopardy Clause was breached in that his second prosecution required relitigation of the same factual issues already resolved by his acquittal of murdering the man whose body he was subsequently charged with unlawfully abandoning. In fact the evidence of "flight" and "abandonment" of the alleged murder victim's body which was adduced as an integral part of his murder trial was stipulated to for purposes of the court's resolution of the guilt issue in the bench trial in the second prosecution.

The fact that petitioner was not even charged with the body abandonment offense until shortly after his acquittal of murder permits the reasonable inference that this prosecution would never have occurred but for his acquittal, and that it was intended to make the defendant "run the gantlet" twice in violation of the foregoing double jeopardy principles.

To the extent that this Court may conclude that petitioner's double jeopardy claim is foreclosed by the dual sovereignty doctrine, he urges the Court to grant certiorari in this case for the purpose of either abrogating that doctrine or creating an additional exception to it in cases such as this where its application would unreasonably frustrate the Double Jeopardy Clause. For decisions recognizing other exceptions to the dual sovereignty rule, see *Grafton v. United States*, 206 U. S. 333 (1907); *Puerto Rico v. Shell Co.*, 302 U. S. 253 (1937); and *Waller v. Florida*, 397 U. S. 387 (1970).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion below of the Supreme Court of Nebraska.

Respectfully submitted,
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APPENDIX A

Heard before SPENCER, C. J., Pro Tem., BOS-LAUGH, McCOWN, CLINTON, BRODKEY and WHITE, JJ., and BLUE, District Judge.

BLUE, District Judge.

On September 23, 1976, in the State of Wyoming, David Parker was shot with a shotgun, which resulted in his death within a short time. After the shooting, the defendant, Richard Robinson, stated, "I just wanted to get the body away from the house, and away from my mind." The defendant loaded the body into the trunk of an automobile and drove the car until the gas gauge showed empty. He then drove off into a ditch, got out, and rode back home with his wife in another car. The automobile with the body of Parker was left at a point just east of the Wyoming-Nebraska state line. The defendant was charged with murder by Wyoming authorities, but was found not guilty on April 22, 1977.

On September 2, 1977, in Scotts Bluff County, Nebraska, defendant, Richard Robinson, was charged with a violation of section 28-1033, R. R. S. 1943, in that he did, "unlawfully and feloniously throw away or abandon a dead human body in a place other than a regular place for burial and without the issuance of a proper death certificate." He was also charged with being an habitual criminal. Preliminary pretrial motions were filed and over-

ruled. A jury was waived, and the habitual criminal charge was dismissed by the State. A trial was had on stipulated evidence, and the defendant was found guilty. A motion for new trial was overruled, and the defendant was sentenced to a term of 2 years in the Nebraska Penal and Correctional Complex.

The defendant has appealed and contends, among other things, that section 28-1033, R. R. S. 1943, is so overbroad, vague, and indefinite as to violate the defendant's due process of law rights under both the Nebraska and United States Constitutions.

Section 28-1033, R. R. S. 1943, reads in its entirety as follows: "It shall be unlawful for any person or persons to throw away or abandon any dead human body, or any portion thereof, in any place other than a regular place for burial and under a proper death certificate issued under either section 71-182 or 71-605."

[1] The terms the defendant complains of are "to throw away or abandon," "dead human body, or any portion thereof," "regular place for burial," and "proper death certificate" issued under section 71-182 or 71-605. This court has said many times that it is not necessary for a penal statute to be written so as to be beyond the mere possibility of more than one construction. Although a penal statute is required to be strictly construed, it should be given a sensible construction and general terms therein should be limited in their construction and application so as not to lead to injustice, oppression, or an absurd consequence. *State v. Lewis*, 184 Neb. 111, 165 N. W. 2d 569 (1969); *State v. Saltzman*, 194 Neb. 525, 233 N. W. 2d 914 (1975); *State v. Nance*, 197 Neb. 257, 248 N. W. 2d 339

(1976). In the *Lewis* case defendant contended that the use of the terms "forcibly resist," "use," "deadly," "dangerous," and "weapon" resulted in the statute being unconstitutional under the "void for vagueness doctrine." This court held in that case the meaning of these terms was not in doubt.

It is apparent here, as in *State v. Lewis, supra*, that the terms which are challenged for vagueness are words of common usage and ordinarily such words need not be defined in the statute. *State v. Holland*, 183 Neb. 485, 161 N. W. 2d 862 (1968) and *State v. Lewis, supra*. As Chief Justice White stated in *State v. Lewis, supra*, "It might be said that they are words in common context that descend to the level of an irreducible minimum of definition."

Defendant cites *State v. Adkins*, 196 Neb. 76, 241 N. W. 2d 655 (1976), and other cases in which this court has found that legislation was void for vagueness. A reading of these cases readily shows that the statutory language in these cases cited by the defendant is quite different from the statutory language of section 28-1033, R. R. S. 1943.

[2,3] We do not find the statute to be vague or indefinite. Even if there was some question about it, what we said in *State v. Shiffbauer*, 197 Neb. 805, 251 N. W. 2d 359 (1977) and in *State v. Briner*, 198 Neb. 766, 255 N. W. 2d 422 (1977) would be appropriate. "The prohibition against excessive vagueness does not invalidate every statute which a reviewing court believes could have been drafted with greater precision. All the Due Process Clause requires is that the law give sufficient warning that men may conform their conduct so as to avoid that which is

forbidden." The statute here is sufficiently clear that a person of ordinary intelligence has fair notice of exactly what is forbidden. The actions of the defendant were clearly prohibited under any reasonable construction of the statute. Although hypothetical factual situations might be imagined where the application of the statute might raise constitutional issues, such imaginary factual situations do not help the defendant, nor make the statute unconstitutional.

Defendant also contends that his prosecution for abandoning the dead body of David Parker placed the defendant in double jeopardy, in that he has previously been acquitted in Wyoming for the murder of David Parker.

[4-6] This court has held that a distinction exists between an offense and the unlawful act out of which it arises, it being possible that two or more distinct offenses may grow out of the same transaction or act; and the rule that a person cannot be twice put in jeopardy for the same offense has no application where two separate and distinct crimes are committed by one and the same act, because the constitutional inhibition is directed to the identity of the offense and not to the act. *Jeppesen v. State*, 154 Neb. 765, 49 N. W. 2d 611 (1951); *State v. Goodloe*, 197 Neb. 632, 250 N. W. 2d 606 (1977).

In *State v. Pope*, 192 Neb. 755, 224 N. W. 2d 521 (1974), this court held that double jeopardy did not bar prosecution for two offenses, possession of heroin and possession of cocaine, because the same evidence would not have satisfied the requirements to convict for both offenses.

[7] In the present case it is obvious that the same evidence would not convict for both murder and for abandoning a dead body.

The defendant cites *Ashe v. Swenson*, 397 U. S. 436, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970), in support of his contention that the doctrine of equitable estoppel applies to the second prosecution. That case involved an armed robbery of six poker players. The petitioner was charged with the robbery of one of the participants in the poker game, but was acquitted on that charge. Subsequently, the State brought the petitioner to trial on the charge of robbery of one of the other participants and he was convicted. The United States Supreme Court reversed the conviction, applying the doctrine of collateral estoppel to the second prosecution. As stated by the majority in the *Ashe* case: "The question is not whether (the State) could validly charge the petitioner with six separate offenses for the robbery of the six poker players. It is not whether he could have received a total of six punishments if he had been convicted in a single trial of robbing the six victims. It is simply whether, after a jury determined by its verdict that the petitioner was not one of the robbers, the State could constitutionally hale him before a new jury to litigate that issue again." Thus, it is clear to us that *Ashe v. Swenson, supra*, is not controlling in this case.

The defendant was not placed in double jeopardy by the prosecution in Nebraska.

The defendant also contends that his testimony in Wyoming should have been suppressed in the Nebraska proceedings as self-incriminatory in violation of the Nebraska Constitution and the United States Constitution.

[8] The general rule is that a defendant's testimony at a former trial is admissible in evidence against him in later proceedings. *Harrison v. United States*, 392 U. S. 219, 88 S. Ct. 2008, 20 L. Ed. 2d 1047 (1968). The Supreme Court stated: "In this case we need not and do not question the general evidentiary rule that a defendant's testimony at a former trial is admissible in evidence against him in later proceedings. A defendant who chooses to testify waives his privilege against compulsory self-incrimination with respect to the testimony he gives, and that waiver is no less effective or complete because the defendant may have been motivated to take the witness stand in the first place only by reason of the strength of the lawful evidence adduced against him." The Court of Appeals for the Eighth Circuit has applied this rule to a criminal proceeding. *United States v. Cecil*, 457 F. 2d 1178 (1972). At a state trial against others who lived with him, Cecil testified in support of a defense motion to suppress evidence seized in a search of the house. The court ruled that the testimony was given voluntarily in an effort to help his friends and was therefore admissible against him in a trial resulting in his conviction for possessing a short-barreled shotgun.

[9] In our case the defendant testified in the Wyoming trial because he was forming a defense for murder. He testified in order to help himself. Moreover, Mr. Robinson's testimony was given under the direction of counsel.

Nevertheless, the question is not whether the defendant made a knowing decision to testify, but why? *Harrison v. United States, supra*. In *Harrison*, the defendant's conviction at his first trial was overturned because illegally

obtained confessions had been introduced. On remand the prosecution read to the jury the defendant's testimony at the prior trial. The United States Supreme Court ruled that such testimony was the fruit of a poisonous tree because it had been given by the defendant to counter the effect of the evidence which was wrongfully allowed at the first trial. In the present case the record is devoid of any indication that the defendant testified in order to counter any illegal government action at the murder trial. Therefore, the only inference which can be drawn is that he testified because, with the advice of his counsel, he considered it to be in his own best interest to do so. Consequently, he is responsible for the results of such public statements, including their use as evidence in the instant case.

[10, 11] The evidence clearly established each element of the offense prohibited by section 28-1033, R. R. S. 1943. This court will not interfere on appeal with a conviction based upon evidence unless it is so lacking in probative force that the court can say as a matter of law that it is insufficient to support a verdict of guilt beyond a reasonable doubt. *State v. Olson*, 200 Neb. 341, 263 N. W. 2d 485 (1978); *State v. Sommers*, 201 Neb. 809, 272 N. W. 2d 367 (1978).

[12, 13] There is no merit to defendant's claim of excessive sentence. A sentence imposed within statutory limits will not be disturbed on appeal unless there is an abuse of discretion. *State v. McKenney*, 198 Neb. 564, 254 N. W. 2d 81 (1977); *State v. Kerns*, 201 Neb. 617, 271 N. W. 617, 271 N. W. 2d 48.

The judgment is affirmed.

AFFIRMED.

APPENDIX B

April 11, 1979

State of Nebraska v. Richard Robinson NO. 42115

Finding no probable error in the prior judgment of this court herein, the motion of appellant is overruled and a rehearing herein is denied.

Supreme Court, State of Nebraska, ss:

I, LARRY D. DONELSON, Clerk of the Supreme Court of the State of Nebraska, do certify that I have compared the foregoing copy of journal entry in the case of State of Nebraska v. Richard Robinson No. 42115, with the original now on file in my office, and that the same is a correct transcript thereof, and of the whole of said original.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused to be affixed the Seal of said Court, at the City of Lincoln, this 29th day of June, 1979.

(Seal) /s/ Larry D. Donelson, Clerk

by
Deputy